Supreme Court, U.S.
FILED

(2)

No. 04-1698 JUN 13 2005

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In The

Supreme Court of the United States

JIMMY HUSBAND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit Court of Appeals erred in its interpretation of Petitioner's 18 U.S.C. § 2251(a) violation, as set forth in the Indictment, regarding when the five-year statute of limitations began to run. Such an interpretation conflicts with the notice requirements of the United States Constitution and relevant Supreme Court precedent. The error effectively denied Petitioner his Fifth and Sixth Amendment rights, departing so far from the accepted and usual course of judicial proceedings as to require Certiorari review.

2. Whether the Fourth Circuit Court of Appeals erred in finding that the district court's plain error was "harmless." Such a conclusion disregards an important question of federal law settled by this Honorable Court in *United States v. Booker*.

LIST OF ALL PARTIES

Pursuant to Supreme Court Rule 14.1, the undersigned counsel hereby certifies that the following listed persons and parties have an interest in the outcome of this case. These representations are made so the Judges of this Court may evaluate possible disqualification or recusal pursuant to the local rules of court.

1. **ALLEN**, Arenda L. Wright
   AUSA/Trial and Sentencing Counsel for Respondent

2. **COLLINS**, Christopher J.
   Trial and Sentencing Counsel for Petitioner

3. **ELSTON**, Michael J.
   AUSA/Appellate Counsel for Respondent

4. **HUSBAND**, Jimmy
   Defendant/Appellant/Petitioner

5. **McNULTY**, Paul J.
   Appellate Counsel for Respondent

6. **SHEIN**, Marcia G.
   Appellate Counsel for Petitioner

7. **SMITH**, Honorable Rebecca Beach
   United States District Court Judge

With respect to this Appeal, there are no corporate entities for purposes of disclosure.

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No. _____

In The
Supreme Court of the United States

JIMMY HUSBAND,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit
Appellate Case No. 03-4630

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a *writ of certiorari* issue to review the decision rendered by the Fourth Circuit of Appeals on January 11, 2005, as well as the Fourth Circuit's Order of March 14, 2005, which denied a rehearing en banc.

The Fourth Circuit has entered a decision in this case that not only squarely conflicts with the United States Constitution and Supreme Court precedent, but also departs

so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's supervisory power.

In addition, the Fourth Circuit's conclusion that the district court's error was harmless decides an important question of federal law that has not been, but should be, settled by this Honorable Court

OPINION BELOW

The opinion by the Fourth Circuit Court of Appeals is an unpublished opinion. Reference to the opinion is thereby limited to the following: ***United States v. Husband***, No. 03-4630, 119 Fed. Appx. 475 (4th Cir. 2005) (unpublished), *rehearing denied*, No. 03-4630-II (4th Cir. March 14, 2005).

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Petitioner respectfully seeks review on Certiorari from the decision rendered by the Fourth Circuit on January 11, 2005, as well as the Fourth Circuit's Order denying a rehearing en banc on March 14, 2005.

Pursuant to Supreme Court Rule 10, jurisdiction in the Supreme Court is now appropriate, as the Fourth Circuit is believed to have entered a decision that is in conflict with the United States Constitution and precedent of the Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment – "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law."

Sixth Amendment – "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation; . . . and to have the Assistance of Counsel for his defence [sic]."

Fourteenth Amendment – "[No State shall] deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

On October 15, 2002, a federal grand jury returned a twenty-count indictment against Petitioner in the Eastern District of Virginia, charging the following: **Counts 1-17** - sexual exploitation of a minor in violation of 18 U.S.C. §§ 2251(a) and (d), and 2256(1) and (2); **Count 18** - transportation of child pornography in violation of 18 U.S.C.

§ 2252A(a)(1); and, **Counts 19-20** - possession of child pornography in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and 2256(1) and (2).

The above-referenced charges and convictions in this case stem from an investigation by the Newport News, Virginia Police Department initiated on January 8, 2002, after a videotape, depicting seventeen scenes of Petitioner's adopted daughter in sexually explicit activities, was discovered in Petitioner's home.

The adopted daughter, hereinafter "Jane Doe", was born on December 30, 1979. Jane Doe was under the age of eighteen during the taping of eight of the sexual scenes, as they were taped in 1995 and 1996. The activities depicted on the video were filmed in the family home located in West Monroe, New York. While none of the depicted activities, or taping thereof, took place in Virginia, the videotape was transported to Newport News, Virginia in 2001, when the family relocated.

Counts 9-17 were dismissed on March 27, 2003 pursuant to a motion by the government based on evidence that Jane Doe was over the age of 18 during the time the acts referenced in said Counts took place. Petitioner entered a plea of guilty to Counts 1-8 on April 7, 2003. Counts 18-20 were subsequently dismissed by the district court on July 16, 2003.

Petitioner was sentenced on July 15, 2003 to a term of 87 months imprisonment on each count, to run consecutively, for a total term of 696 months (58 years) imprisonment. Final judgment from the Eastern District of Virginia was entered into record on July 16, 2003.

A timely Notice of Appeal was filed for Petitioner on July 25, 2003 in accordance with Fed. R. App. Proc. 4(b).

Jurisdiction in the Fourth Circuit Court of Appeals was proper pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

Petitioner's appellate brief set forth five issues for review by the Fourth Circuit, including arguments that the statute of limitations barred the prosecution of Petitioner, counsel was ineffective for failing to raise the statute of limitations issue, and the district court erred in running Petitioner's sentences consecutively.

After hearing oral arguments on the issues presented, a panel for the Fourth Circuit issued its Opinion dated January 11, 2005. In said Opinion, the panel determined that the final element of Petitioner's crime was not complete until 2001, rendering the statute of limitations and corresponding ineffective assistance of counsel arguments meritless. In regard to the sentencing issue, the panel agreed with Petitioner that there was an error, which was plain, but decided that the error did not affect Petitioner's substantial rights. The panel, accordingly, denied all of the issues raised on appeal and affirmed the district court.

Petitioner then sought an en banc review of the panel's decision. In the Petition for En Banc Review, Petitioner specifically challenged the panel's finding of when the statute of limitations began to run, as well as the panel's conclusion that the sentencing error was harmless. The Fourth Circuit denied the request for en banc review on March 14, 2005.

As this Petition for Writ of Certiorari is timely submitted, the issues herein are properly before this Honorable Court and should be heard as this case departs so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. THE FOURTH CIRCUIT COURT OF APPEALS ERRED IN ITS INTERPRETATION OF PETITIONER'S 18 U.S.C. § 2251(a) VIOLATION, AS SET FORTH IN THE INDICTMENT, REGARDING WHEN THE FIVE-YEAR STATUTE OF LIMITATIONS BEGAN TO RUN. SUCH AN INTERPRETATION CONFLICTS WITH THE NOTICE REQUIREMENTS OF THE UNITED STATES CONSTITUTION AND RELEVANT SUPREME COURT PRECEDENT. THE ERROR EFFECTIVELY DENIED PETITIONER HIS FIFTH AND SIXTH AMENDMENT RIGHTS, DEPARTING SO FAR FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO REQUIRE CERTIORARI REVIEW.

Counts One through Eight of the Indictment each charge Petitioner with a violation of 18 U.S.C. §§ 2251(a), (d), 2256(1) and (2). Whereas § 2256 is a definitional statute and § 2251(d) prescribes the punishment for a § 2251 offense, § 2251(a) is the substantive offense with which Petitioner was charged. The statute provides in pertinent part:

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, . . . with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (d), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, . . . or if such visual depiction has actually been

> transported in interstate or foreign commerce or mailed.

18 U.S.C. § 2251(a).

As part of the Protection of Children Against Sexual Exploitation Act of 1977 (the "Act"), the initial purpose in enacting § 2251(a) was to combat the developing child pornography industry, which had "become [a] highly organized, multimillion dollar industr[y] that operate[d] on a nationwide scale" with "the sale and distribution of such pornographic materials . . . carried on to a substantial extent through the mails and other instrumentalities of interstate and foreign commerce." Sen. Rpt. 95-438, at 5 (September 16, 1977), *reprinted in* 1978 U.S.S.C.A.N. 40, 42-43. An affirmative burden of showing that a defendant charged under § 2251(a) knew or should have known that such pornographic materials would be transported in interstate commerce was placed on the government "to preserve the balance between the law enforcement responsibilities of federal officials on one and, and [sic] their state and local counterparts, on the other." *Id.*, at 16.

Through the evolution of the Act, the jurisdictional element of § 2251(a) has remained intact. In essence, the federal crime charged by § 2251(a) is the *transportation* of child pornography in interstate commerce. There are two kinds of § 2251(a) violations: one covering the situation when the defendant has knowledge at the time the visual depiction is created that it would be transported across state lines; the other covering the situation when the defendant has no such knowledge at the time the depiction is created but thereafter actually transports the visual depiction across state lines. *See United States v. Sirois*, 87 F.3d 34 (2nd Cir. 1996). That these are alternative forms of § 2251(a) liability is further evidenced by the use of the disjunctive in the final element of § 2251(a): a child pornographer violates § 2251(a)

if (1) "[he] knows or has reason to know that [the] visual depiction will be transported in interstate or foreign commerce or mailed, . . . *or*" (2) "if such visual depiction has actually been transported in interstate or foreign commerce or mailed." 18 U.S.C. § 2251(a) (emphasis added). In the case of a violation based on allegations of actual transport of pornography, the offense cannot be complete until the moment the depiction is transported across state lines, and thus remains inchoate until that transport occurs. *Sirois*, 87 F.3d at 39. In contrast, a § 2251(a) violation predicated on a defendant's knowledge or intent to transport pornography, formed at the time of its creation, does not remain inchoate, but rather is complete the moment the depiction is created with the requisite knowledge or intent. *United States v. Reinhart*, 357 F.3d 521 (5th Cir. 2004). In the latter instance, the time of actual transport is irrelevant in determining the time at which the offense occurred because the government need not prove that the depiction was actually transported across state lines. *Id.*

A § 2251(a) violation is subject to the five-year statute of limitations set forth by 18 U.S.C. § 3282. *See, e.g., United States v. Thomas*, 893 F.2d 1066 (9th Cir. 1990); *American Liberty Association, et al. v. Reno*, 33 F.3d 78, 91 (D.C. Cir. 1995). The statute of limitations begins to run only when all elements of the crime have occurred. *See, e.g., United States v. Crossley*, 224 F.3d 847, 859 (6th Cir. 2000). Therefore, it is essential to ascertain the inchoate nature of a § 2251(a) offense in order to determine whether the charge is barred by the statute of limitations.

The Fourth Circuit Court of Appeals noted in its opinion that "the grand jury indictment *implied* that the 'jurisdictional element' relied upon in this case was the third prong of § 2251 – that the tape was transported from New York to Virginia at some unnamed time." (Opinion at 10-11 n.3) (emphasis added). Accordingly, the Fourth Circuit

determined that Petitioner's crime was inchoate until 2001, "when the tape was transported across state lines, not 1995, when actions that were filmed took place." (Opinion at 11) (citation omitted). Such a finding, however, can be sustained only if the Petitioner had fair notice of the charges against him, which squarely conflicts with the requirements of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and relevant Supreme Court precedent.

An 18 U.S.C. § 2251(a) violation falls into none of these categories, nor did the indictment suggest that in any way were the counts of indictment an attempt or conspiracy or an attempt to incite. *Toussie v. United States*, 397 U.S. 112 (1970) reveals three important holdings that the Fourth Circuit failed to apply: (1) that the statute of limitations begins to run when the elements of the offense are complete; (2) that Congress has declared a policy that the statute of limitations should not be extended "[e]xcept as otherwise expressly provided by law" (18 U.S.C. § 3282) indicating that the doctrine of continuing offenses should be applied only in limited circumstances; and (3) that decisions to consider an offense as a continuing one should not be reached unless the explicit language of the statute compels such a conclusion or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one. As the Court has said before "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication." *United States v. Universal Corp.*, 344 U.S. 218, 221-222. 97 L. Ed. 260, 264, 73 S. Ct. 227 (1952). Not insignificantly those remarks were also made in the context of the continuing offense doctrine. As for item one, no matter how you do the math, the three (3) essential elements

of § 2251(a) were never completed within any 5 year period. If you start from the last count, spring of 1996, all the elements, nor the indictment were complete within five years. If you start from the alleged date of transportation and go back 5 years, the elements are not complete, or if you use the view expressed in *United States v. Cores*, 356 U.S. 405, 409, 2 L. Ed. 2d 873, 78 S. Ct. 875 (1958), the only question the statute of limitations raises is whether, at any time within 5 years preceding the indictment, the 3 elements of the offense, (the use, of a minor to create a visual depiction, that was transported in interstate commerce) actually described the accused conduct. Nothing in the statute's language indicates that Congress intended in any way for this offense to be continuing. Such offenses to be prosecuted must be completed within 5 years.

The Statute: 18 U.S.C. § 2251(a) provides 3 methods of committing the predicate offense of creating a video depiction of a minor engaged in sexual activity and 2 methods[1] of completing the needed jurisdictional element to make this a Federal offense as opposed to some lesser state offense. The entire statute is written in the disjunctive, allowing a number of combinations to charge a defendant with a violation of this section. A defendant may be charged under the "USE" element (any person who uses, employs, induces, entices, or coerces any minor to engage in), the "ASSISTANCE" element (one who has a minor assist any other person to engage in), the "TRANSPORTATION" element (one who transports any minor in interstate or foreign commerce or in any territory or possession of the United States). *See United States v. Carroll*, 105 F.3d 240 (1st Cir. 1997). The jurisdictional elements are listed as (1) "if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed," and/or (2) "or if such visual depiction has actually been transported in interstate or foreign

[1] 1995 version.

commerce or mailed." It is important to note that in 1998 the statute was amended to include a third jurisdictional element "if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer."

Inchoate Offense: The three inchoate offenses are attempt, conspiracy, and solicitation. A principal feature of these crimes is that they are committed even though the substantive offense is not successfully consummated. No such change exists against Petitioner.

Statute of Limitations: Congress has provided that the statute of limitations has run if for non-capital offenses an indictment is not brought within 5 years. 18 U.S.C. § 3282. The Supreme Court has defined the start of this period as "when the elements of the offense are complete, unless otherwise expressly provided by law." *See United States v. Toussie*, 397 U.S. 112, 25 L. Ed. 2d 156, 90 S. Ct. 858. The Court in *Toussie* also states that for the purpose of statute of limitations, an offense will not be considered as continuing unless Congress has included in the language of the statute that language allowing the statute of limitations to run past the 5 year limitation.

The Petitioner was charged by indictment on October 15, 2002 of eight counts of violating the "use" element of 18 U.S.C. § 2251(a) and the "actual transportation element" (jurisdictional). Each count of offense contained a date of offense and no count made reference to any other count or any date other than the one contained in each count. The Court, AUSA, and Defendant all agreed that the date of offense was 1995 and that the 1995 version of the Sentencing Guidelines would apply. Upon advice from trial counsel, the Petitioner pled guilty to eight counts of violation of 18 U.S.C. § 2251(a). On direct appeal, the

Petitioner claimed plain error that the trial counsel failed to raise the statute of limitations issue and also that trial counsel's assistance was ineffective for not raising the issue. The Fourth Circuit Court of Appeals decided that the statute of limitations was not expired because the video tape actually was not moved until 2001 and determined that this § 2251(a) violation was inchoate until that date.

In stating that Petitioner's case was an inchoate offense, the Fourth Circuit split with the decisions of the Second and Fifth Circuits, who in the cases of *Sirois* and *Reinhart* respectively, took care in not holding that all violations of § 2251(a) remain inchoate until the pornography crosses state lines.

As noted above, common law has created these inchoate offenses, attempt, conspiracy, and solicitation. To attempt a § 2251(a) violation without completing it seems unlikely given the elements. The two inchoate offenses that may apply to § 2251(a) would be conspiracy or solicitation, which then requires additional criminally liable to be completed. The term "inciting another to commit a crime" does not apply here as the victim cannot be "incited" to commit a crime. It stands to reason that the defendant is not inciting the victim to join in commission of a crime. The accepted definition of incite would therefore not apply here, and to incite would require two or more defendants. Another term that falls under the umbrella of solicit is abetted. In *Sirois, supra,* one defendant was charged with aiding and abetting another.

The last inchoate offense to consider is that of conspiracy. A conspiracy obviously consists of more than one defendant, and continues until the object of the conspiracy is complete. In *Reinhart,* the Fifth Circuit charged in the indictment a conspiracy to violate § 2251(a). By doing

so they had established an inchoate offense and tolled any statute of limitations until the conspiracy was complete.

It is important to compare the Petitioner's case, with those of *Sirois* and *Reinhart*. (1) Petitioner is charged as a single defendant, both *Sirois* and *Reinhart* had co-defendants or co-conspirators, (2) in the Petitioner's case, the statute of limitations had run per *Toussie* prior to any indictment. In *Sirois* and *Reinhart*, the 5 year statute of limitations had not expired prior to indictment. (3) Both *Sirois* and *Reinhart* were indicted for § 2251(a) violations that included an inchoate offense, Petitioner was not.

The Indictment Clause of the Fifth Amendment provides, in pertinent part, that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V. In conjunction with the notice requirement of the Sixth Amendment, the Indictment Clause provides two additional protections: the right of a defendant to be notified of the charges against him through a recitation of the elements, and the right to a description of the charges that is sufficiently detailed to allow the defendant to argue that future proceedings are precluded by a previous acquittal or conviction. *See Russell v. United States*, 369 U.S. 749, 763-64 (1962); *Hamling v. United States*, 418 U.S. 87, 117 (1974). In addition, "the Due Process Clause of the Fourteenth Amendment mandates that whatever charging method the state employs must give the criminal defendant fair notice of the charges against him to permit adequate preparation of his defense." *Madden v. Tate*, 830 F.2d 194 (6th Cir. 1987). The opinion in *United States v. Cruikshank*, 92 U.S. 542 (1875), demonstrates that these principles have been well-established:

> The object of the indictment is, first, to furnish the accused with such a description

> of the charge against him as will enable him to make his defence [sic], and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances.

Id. at 558.

In general, an indictment must be sufficiently particular if it states the offense using the words of the statute itself, as long as the statute elucidates all the elements of the crime. *Hamling*, 418 U.S. at 117. Nevertheless, while "the language of the statute may be used in the general description of the offense, . . . it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *Id.* at 117-118 (internal quotation marks and citation omitted).

The problem with the Fourth Circuit's finding that Petitioner's § 2251(a) violation was inchoate until 2001 is that it contradicts the description of the charges, as set forth in the Indictment. In the Indictment the government emphasized the facts and circumstances surrounding the *production* of the videotape to accompany the language of the statute in the Indictment, but did not stress the facts and circumstances of the *transportation* of the pornographic

video in interstate commerce. By charging Petitioner with an inchoate crime.

Petitioner was implicitly on notice that he was being charged with the § 2251(a) violation predicated on a defendant's knowledge or intent to transport pornography, which is complete the moment the depiction is created. *Cf. Sirois*, 87 F.3d at 37-38 (§ 2251(a) violation based on the actual transport across state lines when the indictment specifically asserted that *the defendant had transported the minor across state lines for the purpose of having the minor engage in sexual activity so that the visual depictions might be produced*).

A review of the plea colloquy corroborates that Petitioner was put on notice that the charges against him were complete with the 1995 and 1996 production of the pornographic video[2] and were not inchoate.

> THE COURT: As I indicated earlier, you are pleading guilty to the indictment, counts 1 through 8, and those all involve charges of sexual exploitation of a minor. (Plea Tr. at 7).

After Petitioner entered his plea, the court allowed the government to make its proffer of evidence, which included: (1) testimony of how the tape was discovered, (2)

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[2] While a valid guilty plea constitutes an admission of the material elements of the crime, *McCarthy v. United States*, 394 U.S. 459, 466 (1969), Fed. R. Crim. P. 11(c) requires the district court to inform the defendant of the nature of the charge. A judge has wide discretion in determining how to ensure the defendant's understanding; however, "it is essential that the defendant receive notice of the true nature of the charge rather than a rote recitation of the elements of the offense." *United States v. Martinez*, 277 F.3d 517, 530 (4th Cir. 2002) (internal quotations and citation omitted). Thus, a review of the court's description of the crime during the Rule 11 hearing is appropriate in determining the inchoate nature of the charges Petitioner was informed of.

Petitioner's admissions regarding the sexual relationship with "Jane Doe" and the production of the videotape, (3) testimony that the tape depicts a minor under the age of 18 engaging in sexually explicit activity, (4) testimony confirming the location of filming, and (5) the videotape itself. (Plea Tr. at 20-26). The court subsequently confirmed two points in addition for the record:

> THE COURT: The victim herself would testify, and would testify that she was under age 18?
>
> So that the record is clear, how many counts did you drop because you determined that they would be over the age of 18? (Plea Tr. at 26-27).

The court then verified that Petitioner agreed with the government's proffer of evidence and accepted the plea:

> THE COURT: Then, based upon your guilty pleas and the government's proffer of evidence and your agreement therewith, I would find as a fact that you did commit the sexual exploitation of a minor, as set forth in counts 1 through 8 of the indictment, and I accept your guilty pleas. (Plea Tr. at 28).

There was absolutely no reference made to the fact that the pornographic video was actually transported across state lines in 2001 or the Petitioner was charged with an inchoate crime which could take the case outside the 5 year statute of limitations. Thus, the inchoate nature of the charges that Petitioner was informed of during the Rule 11 proceeding pled guilty to was the "commit[ting] of the sexual exploitation of a minor," *i.e.*, the *production* of the videotape. Again, Petitioner was put on notice that his § 2251(a)

violation was complete the moment the video was created, not at the time of actual transport.

Given the way Petitioner was indicted and informed of the nature of the charges against him, the Fourth Circuit erred in determining that his § 2251(a) offense was inchoate until 2001 such a finding is outside the scope of all charges, including dismissed counts. As all of the elements of Petitioner's crime were complete at the time the videotape was produced, the statute of limitations began to run in 1995 and 1996. Thus, the five-year limitation period had tolled by the time the Indictment was returned in October 2002 and the charges against Petitioner were consequently barred: "Every statute of limitations, of course, may permit a rogue to escape," *Pendergast v. United States*, 317 U.S. 412, 418 (1943), but when the statute bars a prosecution, the court must give effect to the clear expression of congressional will that in such a case "no person shall be prosecuted, tried, or punished [unless the indictment is found within five years after such offense was committed]." *Toussie v. United States*, 397 U.S. 112, 115 (1970) (quoting 18 U.S.C. § 3282).

Based upon its finding that the statute of limitations argument was "meritless," the Fourth Circuit concluded that counsel's failure to raise the issue with the district court was neither deficient nor prejudicial to Petitioner. (Opinion at 20-21). However, because the Fourth Circuit erred in determining that the § 2251(a) violation was inchoate until 2001 and the Sixth Amendment to the United States Constitution guarantees a defendant in a criminal proceeding the right to effective assistance of counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963), the error effectively denied Petitioner of his Sixth Amendment rights as plain error or otherwise.

The record is clear that the statute of limitations barred the charges against Petitioner. Counsel failed to raise

the issue. Both are plain error and prejudicial and effects the liberty rights of the Petitioner. As the Indictment should have been dismissed on these grounds, counsel's error was so plainly serious as to render his performance deficient and any such error plain. In addition, counsel's deficient performance prejudiced Petitioner, as there is a reasonable probability that, had counsel raised the issue with the district court, the Indictment would have, in fact, been dismissed. As *Toussie* explains:

> The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. For these reasons and others, we have stated before the principle that criminal limitations statutes are to be liberally interpreted in favor of repose.

Id., 397 U.S. at 114-115 (internal quotations and citations omitted).

As indicated, the courts relate to the production of the video because it charges eight separate offenses. If the crime were intended to be inchoate, there would only be one violation because the one videotape was taken across state lines once. To imply inchoate elements in an offense not

charged as such violates the Petitioner's Constitutional rights. No notice of proper charges were filed or presented to a grand jury nor was jurisdiction established as the statute of limitations had run on the non inchoate charged offense.

In conclusion, the Fourth Circuit's finding that Petitioner's § 2251(a) violation remained inchoate until 2001 conflicts with the notice requirements of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, as well as relevant Supreme Court and other circuit precedent. As such, it is respectfully requested that this Honorable Court exercise its authority to fashion relief in the interest of justice: to allow such a decision to stand would result in a miscarriage of justice and establish Fourth Circuit precedent contrary to fundamental principles of fairness, integrity and public reputation of judicial proceedings and this court's previous decision.

II. THE FOURTH CIRCUIT COURT OF APPEALS ERRED IN FINDING THAT THE DISTRICT COURT'S PLAIN ERROR WAS "HARMLESS." SUCH A CONCLUSION DISREGARDS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS BEEN SETTLED BY THIS HONORABLE COURT IN LIGHT OF *UNITED STATES V. BOOKER*.

The Presentence Investigation Report ("PSR") in this case correctly determined that the 1995 version of the Sentencing Guidelines applied, which relied on a statutory scheme with a maximum penalty of 10 years (120 months) for each count. The PSR grouped the eight counts of conviction in accordance with U.S.S.G. § 3D1.2 and calculated the total applicable guideline range as 70-87 months. Because the applicable guideline range fell below the statutory maximum, U.S.S.G. § 5G1.2(d) also applied. § 5G1.2(d) provides:

> If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentences on all counts shall run concurrently, except to the extent otherwise required by law.

The district court, nevertheless, imposed a sentence of 87 months imprisonment on each count, to run consecutively, for a total term of 696 months (58 years).

Applying a plain-error analysis under Fed. R. Crim. Proc. 52(b), the Fourth Circuit Court of Appeals found that district court *did* plainly err in imposing Petitioner's sentence, but concluded, "the error certainly does not affect [Petitioner's] substantial rights, for he would justifiably receive precisely the same sentence [on remand]." (Opinion at 20) (internal citation omitted). In reaching its conclusion, the Fourth Circuit relied upon a statement made by the district court during sentencing:

> If for some reason the appellate court is not in agreement with me, then my alternative ruling is that I would upwardly depart on these matters. In other words, I would not be in the guideline range here. I would upwardly depart and do an appropriate sentence with an upward departure that would meet the goals of this particular case.

(Opinion at 19-20). However, such an error was harmful in light of the January 12, 2005 Supreme Court decision in

United States v. Booker, 543 U.S. ___ (2005), which was decided one day after the opinion in this case was rendered.

To establish that [an] error affecting a defendant's substantial rights, the defendant must show that "the error actually affected the outcome of the proceedings." *United States v. Hastings*, 134 F.3d 235, 240 (4th Cir. 1998). As the Fourth Circuit's Opinion in this case was handed down on January 11, 2005, *Booker* would have applied to Petitioner's case on remand.

In *Booker*, this Honorable Court found that the Sixth Amendment is violated when a district court, acting pursuant to the Sentencing Reform Act and the Federal Sentencing Guidelines, imposes a sentence greater than the maximum authorized by the facts found by the jury alone and, accordingly, instructed that the Guidelines be deemed as advisory instead of mandatory. By creating this provision, the Supreme Court clearly set forth a new rule of constitutional law, specifically designed to protect defendants from violations of their Fifth and Sixth Amendment Rights from the enhancement of a sentence for matters not determined by a jury or agreed to in the plea bargaining process.

Booker would have actually affected the outcome of the sentencing proceedings on remand. The upward departure referenced by the district court was premised on Petitioner's "prior unlawful conduct" with Jane Doe, the "extreme conduct" involved in the production of the sexually explicit videotape, and the "repetitive nature" of Petitioner's conduct. All three of these grounds authorized the district court to enhance Petitioner's sentence based on facts found outside the province of a jury. Under the advisory system, such a departure would not be warranted. Had Petitioner been resentenced on remand pursuant to the upward departure, the *Booker* issue would have been

triggered and Petitioner would have been entitled to further review of his sentence.

United States v. Hughes, 2005 WL 628224 (4th Cir. March 16, 2005) is indicative of how *Booker* would have affected review of Petitioner's sentence based on an upward departure. (The rehearing en banc of Petitioner's appeal was denied two days before *Hughes*). In *Hughes*, the Fourth Circuit vacated and remanded the defendant's sentence after finding that the district court imposed a sentence on the defendant that exceeded the maximum allowed based on the facts found by the jury alone, contrary to *Booker*. As *Booker* was decided after the defendant in *Hughes* was sentenced and the issue was not advanced in the district court, the *Hughes* Court applied a four-prong plain error analysis in reaching its decision: (1) whether an error occurred, (2) whether the error was plain, (3) whether the error affected the defendant's substantial rights, and (4) whether the district court error warrants reversal. (S.Ct. review is still a part of the direct review process requiring this court to remand this case for further proceedings in light of *Booker* and *Hughes*). *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

In determining that an error occurred, the *Hughes* Court stated that, "In *Booker*, the Court ruled that a sentence exceeding the maximum allowed based only on the facts found by the jury violates the Sixth Amendment. . . . The imposition of [the defendant's] sentence, in part based on facts found by the judge, therefore constituted error." Likewise, the imposition of Petitioner's sentence based on facts found outside the province of a jury and Indictment or plea would constitute error.

In deciding that the error was plain, the *Hughes* Court began its analysis by defining the term "plain error": "An error is plain 'where the law at the time of trial was

settled and clearly contrary to the law at the time of appeal.'" (quoting *Johnson v. United States*, 520 U.S. 461, 468, (1997)). The Court continued, "*Booker* has now abrogated our previously settled law. The error committed by the district court in sentencing [the defendant] was therefore plain." Now that *Booker* has established that a defendant may not be sentenced based on facts not found by the jury, the district court's error in sentencing Petitioner based on the upward departure would be, similarly, plain.

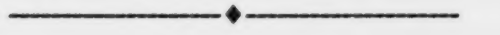
The *Hughes* Court based its prejudice inquiry on the standard set forth by the Supreme Court in *Kotteakos v. United States*, 328 U.S. 750 (1946). In *Kotteakos*, the Supreme Court cautioned that in determining whether an error affected a defendant's substantial rights, the question is not whether an error-free proceeding would have produced the same result; rather, the reviewing court must consider "what effect the error had or reasonably may be taken to have had upon" the outcome of the proceedings. *Id.* at 764. *Kotteakos* continued, "If one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." *Id.* at 765.

The question under the third prong of the plain error analysis, pursuant to the application of *Kotteakos* to *Hughes*, is thus whether the defendant has established that the sentence imposed by the district court as a result of the Sixth Amendment violation "was longer than that to which he would otherwise be subject." (quoting *United States v. Angle*, 254 F.3d 514, 518 (4th Cir. 2001) (en banc)). Petitioner would have been sentenced to a maximum of 120 months absent the departure, a significantly shorter period of time than the 696-month sentence imposed by the district court based on the facts given to grant the departure. Therefore, in

conformity with *Hughes*, the error would have affected Petitioner's substantial rights.

Finally, it would be within the appellate court's discretion to determine whether the district court error warranted reversal: "Our discretion is appropriately exercised only when failure to do so would result in a miscarriage of justice, such as when the defendant is actually innocent." *Hastings*, 134 F.3d at 244. The *Hughes* Court concluded that the exercise of discretion was warranted, even though the record did not provide any indication of what sentence the district court would have imposed had it treated the Guidelines as merely advisory. And, although the *Hughes* Court found that it was certainly possible that the defendant would receive the same sentence on remand, the possibility was not enough to dissuade the Court from noticing the error, as there was nothing in the record to compel such a conclusion. Thus, the Fourth Circuit established that disparity in sentencing from the *Booker* rule constitutes an error that so seriously affects the fairness, integrity or public reputation of judicial proceedings. As such, in the interest of justice, Petitioner's sentence must be vacated in light of *Booker*.

Thus, Petitioner would not have received the same 696-month sentence on remand and the Fourth Circuit's conclusion that the district court's error was harmless decides an important question of federal law that has not been, but should be, settled by this Honorable Court. As such, it is respectfully requested that this Court examine this issue on Certiorari review or remand to comply with the *Booker* decision.



CONCLUSION

The aforementioned errors create serious questions of confidence in the outcome of Petitioner's prosecution, conviction, and sentence. If confidence in the outcome of a judicial proceeding is questioned, the matter should be remanded for further proceedings, whether for reversal of the conviction and dismissal of the charges, or for the imposition of the statutory maximum sentence of 120 months. To do anything different would be a miscarriage of justice.

WHEREFORE, Petitioner prays this Honorable Court will grant the present request, and grant the Writ of Certiorari.

/s/ Marcia G. Shein
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UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 03-4630

[ENTERED: January 11, 2005]

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

JIMMY RICHARD HUSBAND,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Rebecca Beach Smith, District Judge. (CR-02-125)

Argued: September 30, 2004 Decided: January 11, 2005

Before WILKINSON, GREGORY, and SHEDD, Circuit Judges.

Affirmed by unpublished opinion. Judge Gregory wrote the opinion, in which Judge Wilkinson and Judge Shedd joined.

ARGUED: Marcia Gail Shein, Decatur, Georgia, for Appellant. Arenda L. Wright Allen, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Norfolk, Virginia, for Appellee. ON BRIEF: Paul J. McNulty, United States Attorney, Michael J. Elston, Assistant United States Attorney, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

GREGORY, Circuit Judge:

In April 2003, Jimmy Richard Husband ("Husband" or "Appellant") pled guilty in the United States District Court for the Eastern District of Virginia to eight counts of sexual exploitation of a minor in violation of 18 U.S.C. § 2251(a) and (d). The court accepted Husband's plea and subsequently sentenced him to 87 months of imprisonment for each of the eight counts and ordered that the sentences be run consecutively, for a total of 696 months, followed by eight three-year periods of supervised release, also to be run consecutively. Husband timely appeals on five grounds: (1) that he was prosecuted and convicted of crimes for which the governing statute of limitation had expired; (2) that his plea was not voluntary and knowing under Fed. R. Crim. P. 11 because the court misinformed him of the actual penalty he could face; (3) that the court failed to establish an adequate factual basis for accepting his plea; (4) that the court violated the Sentencing Guidelines by sentencing him to consecutive rather than concurrent terms; and (5) that his counsel ineffectively assisted him because his counsel failed to raise and argue the statute of limitations defense.

None of Husband's grounds for appeal is meritorious. Accordingly, we affirm.

I

The immediately following facts are admitted by Appellant: "Jane Doe,"[1] Husband's daughter by adoption and the primary victim in this case, was born in late 1979. In 2001, Husband and his family relocated to Newport News, Virginia from West Monroe, New York. On January 8, 2002, a videotape was discovered that depicted eight scenes of

[1]Out of respect of the victim, we will attempt to minimize revelation of details that would reveal her identity. Unfortunately, the details of this case often make it difficult to do so.

Jane Doe in sexually explicit activities. Three days later, Husband was arrested and charged with possession of child pornography.

The record makes plain that these events then occurred. On October 15, 2002, a federal grand jury returned a twenty-count indictment against Husband, alleging seventeen counts of sexual exploitation of a minor in violation of 18 U.S.C. § 2251(a) and (d), one count of transportation of child pornography in violation of 18 U.S.C. § 2252A(a)(1) ("Count 18"), and two counts of possession of child pornography, both in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and 2256(1) and (2) ("Counts 19 and 20"). On December 16, 2002, Husband pled not guilty to all counts, and a jury trial was scheduled. On March 27, 2003, after numerous pretrial motions and pleadings, the district court dismissed the last nine sexual exploitation counts upon the United States' motion because the conduct charged in those counts took place after Doe turned eighteen years old, leaving only counts one through eight to survive. On April 7, 2003, immediately before the jury trial was scheduled to begin, and without the benefit of a plea agreement, Husband pled guilty to the sexual exploitation counts remaining against him. The court subsequently dismissed counts eighteen through twenty with prejudice.

The facts that are most relevant for this appeal took place at the plea hearing. After the judge established Husband's competence, Husband indicated that he wished to plead guilty. The following exchange then occurred between the court and Husband:

> THE COURT: And the maximum possible penalty on each of these counts, then, Mr. Husband, is a maximum of 20 years imprisonment and a minimum of ten years. Do you understand that penalty?

THE DEFENDANT: Yes, ma'am.

J.A. 35. After establishing that Husband would be a felon and lose substantial rights if he pled guilty, the court then informed him that, "in relation to any sentence that the court will impose, the United States sentencing guidelines are in effect [,]" J.A. 35-36, and that, "ultimately under the law, it is up to the court to sentence you under the federal sentencing guidelines." J.A. 46. Husband acknowledged his assent, admitting that he had discussed the Guidelines with his attorney, and also acknowledged that, under the Guidelines he would be sentenced based not only on "the crimes to which you are pleading guilty, but all of your relevant criminal conduct in regard to the crimes to which you are pleading guilty[.]" J.A. 36. The district court then reaffirmed that "you are pleading guilty to the indictment, counts 1 through 8, and those all involve charges of sexual exploitation of a minor[,]" J.A. 37, and restated each count. The judge then clarified that Husband would be subject to supervised release, "not more than three years on each count." J.A. 42. After noting that Husband would not later be able to withdraw his guilty plea because he did not like the sentence, the following statements were made:

> THE COURT: In other words, without a background presentence report, Mr. Husband, the only promise that I can make to you today is that your sentence on counts 1 through 8 would be somewhere between a minimum of 10 years and a maximum of 20; do you understand?
>
> THE DEFENDANT: Yes, ma'am.

J.A. 47. Finally, after ensuring that Husband had no questions about the sentencing guidelines or their application to his case, and ensuring with Husband's

attorney that no meritorious defenses existed, the district court finally allowed Husband to plead guilty.

The government then proffered evidence of Husband's guilt. The evidence included a videotape of the defendant sexually exploiting his minor daughter on multiple occasions in their New York home. The videotape was discovered by Husband's other daughter on January 8, 2002 in Newport News, Virginia. Also included was an oral confession by Husband that he engaged in sexual activity with Doe and videotaped it over a five- to six-year period. Husband also handwrote a two-page statement corroborating his oral admissions and noting that his sexual desire for Doe began when she was "about six or eight." J.A. 53.[2] After the proffer, the following exchange occurred:

> THE COURT: All right.... Mr. Collins, you have heard what the United States claims it could prove had you called upon it to present a case against this defendant. Do you agree with the proffer?
>
> MR. COLLINS: I agree that would be their evidence, yes ma'am.
>
> THE COURT: Mr. Husband, do you agree with the proffer?
>
> THE DEFENDANT: Yes, ma'am.
> THE COURT: Did you still wish to plead guilty?
>
> MR. HUSBAND: Yes, ma'am.

---

[2]His written admission, however, claimed "oral sex was never done to climax, and there was never penetration of her vagina or anus by me or any other object." J.A. 54. The government proffered a number of witnesses who would refute this claim.

> THE COURT: All right. Then, based upon your guilty pleas and the government's proffer of evidence and your agreement therewith, I would find as a fact that you did commit the sexual exploitation of a minor, as set forth in counts 1 through 8 of the indictment, and I accept your guilty pleas.

J.A. 58-59.

The Presentence Investigation Report ("PSR") concluded that the offenses occurred in 1995 and 1996, so the appropriate Guidelines were from 1995, which relied on a statutory scheme with a maximum penalty of 10 years per count (not 20, as the judge stated, apparently relying upon a later version of the Guidelines). The PSR also found that the offense level was 27 and that Husband's criminal history category was I, which totaled 70-87 months, and that an upward departure may be warranted. The government filed its position on Husband's sentence on June 30th, and Husband filed a "Response... to the Government's Motion for Upward Departure" on July 9th.

The sentencing hearing took place on July 15th, 2003. Husband's counsel did not object to the PSR. He did, however, say he spoke with someone in the probation office, "who assured us that the standard is concurrent sentences." J.A. 117. The judge interrupted immediately, stating,

> Im not going to accept any such argument on the record.... I want to make the record clear, there was no plea agreement whatsoever in this case.... I asked him if any promise had been made to him in return for the plea, and he said no. And I made it clear to him that he faced 2 0 years.

J.A. 117. After more discussion by the judge as to why a probation officer's statements were inapposite, Husband's counsel replied, "I just wanted the court to be aware that that was a primary consideration in the entering of a plea," J.A. 118, whereupon the judge cut counsel off again, making clear that the court would not hear such arguments:

> THE COURT: Frankly, if you want to know the truth, it matters not to me, because if that was a primary consideration, then that should have been made known to the court, and it was never made known to the court.... I know what the plea colloquy was, and I know that it was never discussed that sentences would run concurrently. I advised him that he could get 20 years on each count of conviction. That's what he was advised of.
>
> MR. COLLINS: Yes, ma'am. Nothing further.
>
> THE COURT: All right.

J.A. 118-19.

In support of its request for an upward departure, the government called four witnesses - the case agent, the victim, the victim's mother, and a clinical social worker - to testify to the especially heinous and prolonged nature of the sexual abuse. We will spare the reader the details by noting only that the evidence was, simply put, sad, horrible, and clearly damning.

The court took great pains to establish adequate grounds for Husband's sentence by noting that the prolonged and heinous and degrading behavior over an extremely long period of time along with the repetitive nature of the conduct was sufficient to upwardly depart.

But, it generally appears that, in fact, the court never officially granted the motion for upward departure. See infra n. 7. Rather, the court simply sentenced Husband to 87 months for each count to run consecutively for a total of 696 months, in apparent belief that this was appropriate absent an upward departure. In justifying the decision, the court noted,

> So basically I would find that there are all of these grounds to depart upward. If for some reason the consecutive sentences don't hold, I want to make it clear that this would be an alternative grounds for the court to depart upward. However, I'm of the opinion that in this particular case I do not believe that the sentence imposed on the counts and letting them run concurrently would be at all adequate under the factors set forth in the law. The sentence would be somewhere between - 70 to 87 months is the guideline range, and certainly an 87-month sentence is not sufficient to punish, to remedy this conduct, to meet the heinous activity that has occurred in this particular case. . . . the thrust of this is that the court can run the sentences consecutive if necessary to achieve the appropriate total punishment, considering all of the matters that I have found as a fact here today, which are basically facts in the presentence report.... the way I would propose to proceed is to sentence him within the guidelines on each of the counts and to run those sentences consecutively.

J.A. 124-26. Again, Husband did not object. Now, however, he appeals on the above-stated grounds.

II.

We now address each of Husband's arguments in turn. The short answer is that we affirm on all counts.

A.

Husband first argues that the applicable statute of limitation had expired, and thus that his guilty plea should not have been accepted. Because Husband failed to object below, plain error review governs. See Fed. R. Crim. P. 52(b); United States v. Jarvis, 7 F.3d 404, 409-10 (4th Cir. 1993). This means, of course, that Husband must clear the high hurdle of proving that (1) there was error, (2) the error was plain, (3) the error affected substantial rights, and (4) the error "'seriously affect(s) the fairness, integrity or public reputation of judicial proceedings.'" United States v. Olano, 507 U.S. 725, 732-37 (1993); United States v. Martinez, 277 F.3d 517, 524 (4th Cir. 2002).

It has long been the law in this circuit that a valid guilty plea waives all non-jurisdictional defenses. See, e.g., United States v. Willis, 992 F.2d 489, 490 (4th Cir. 1993) (voluntary guilty plea waives all non-jurisdictional defects); Bloombaum v. United States, 211 F.2d 944, 945 (4th Cir. 1954) (same). Applying this rule here, we find that Husband's plea waives his statute of limitations argument, which is, of course, a non-jurisdictional affirmative defense. See, e.g., United States v. Matzkin, 14 F.3d 1014, 1017-18 (4th Cir. 1994) (statute of limitations is not a jurisdictional defense and can be waived; counsel's failure to seek statute of limitations jury instruction was not plain error even though it was "not an intentional relinquishment of a known right; but was a failure to make the timely assertion of that right"); United States v. Williams, 684 F.2d 296, 299 (4th Cir. 1982), cert. denied, 459 U.S. 1110 (1983) (18 U.S.C. § 3282 is

not jurisdictional, but affirmative defense that may be waived).

While this is surely enough to end the inquiry, because the statute of limitations issue becomes relevant to subsequent arguments, we note that Husband's statute of limitations claim is meritless for a number of reasons, not the least of which is that the final element of his crime was not complete until 2001, when the tape was transported across state lines.[3] The statute of limitations does not begin until all the elements necessary for the crime are completed. See, e.g., United States v. Crossley, 224 F.3d 847, 859 (6th Cir. 2000) (statute of limitations begins to run only when all elements of crime have occurred); United States v. United Med. and Surgical Supply Corp., 989 F.2d 1390, 1398 (4th Cir. 1993) (securities or mail fraud is not complete until sale of security or use of the mail). Thus, the clock did not begin running until 2001, when the tape was transported across state lines, not 1995, when actions that were filmed took place. See United States v. Sirois, 87 F.3d 34, 39 (2d Cir. 1996). As such, the case was unquestionably within any applicable statute of limitations.

B.

Husband also argues that his guilty plea was involuntary because the district court failed to advise him of the true penalty he faced as a result of his guilty plea. As noted above, the trial judge, apparently relying on a more

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[3]The grand jury indictment implied that the "jurisdictional element" relied upon in this case was the third prong of § 2251 - that the tape was transported from New York to Virginia at some unnamed time. At the plea hearing, the government also noted that the tape showed conduct from New York and was found in Virginia. Thus, the government contends that the crime was inchoate until 2001. Husband's counsel apparently agreed: at the sentencing hearing, Husband's counsel admitted that, "It was, in fact, his taking it across state lines that made it a federal case." J.A. 115.

current version of the Sentencing Guidelines, told Husband at the plea hearing that he was subject to 10 to 20 years of prison for each count (and then, Husband contends, for all counts). The PSR, however, subsequently recommended - and Husband was evidently ultimately sentenced under - the 1995 Sentencing Guidelines, which mandated a maximum 10-year sentence per count.[4] The real issue here, though, is that the court sentenced Husband to consecutive terms. Husband argues that he was given more punishment than he was warned of, and that, as a result, his plea was unknowing and involuntary.

Trial courts conducting plea colloquies are given deference. United States v. DeFusco, 949 F.2d 114, 116 (4th Cir. 1991), cert. denied, 503 U.S. 997 (1992) ("this Court should accord deference to the trial court's decision as to how best to conduct the mandated colloquy with the defendant"). Consequently, "any Rule 11 violations should be evaluated under a harmless error standard." Id. at 117. See also Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

In accepting a guilty plea, the court must simply determine "whether the defendant's knowledge and comprehension of the full and correct information would

---

[4]The PSR mistakenly relied upon the idea that the crimes were completed in 1995, and thus that the 1995 Sentencing Guidelines were in effect. This was error because, as we explained in Part II.A, supra, the crime was inchoate until 2001, when the videotape crossed state lines. Section 1B1.11 of the Guidelines requires courts to use the "Guidelines Manual in effect on the date that the defendant is sentenced[,]" unless doing so would violate the ex post facto clause. Because Husband was Sentenced on July 15, 2003, and because the 2002 Guidelines were identical to those in effect in 2001 for purposes of Husband's crime, the 2002 Sentencing Guidelines should have been used. However, since Husband was sentenced under a Guidelines scheme counseling the 1995 statutory maximum of 10 years per count rather than the 2001 statutory maximum 20, the error was in Husband's favor, and thus harmless.

have been likely to affect his willingness to plead guilty." United States v. Goins, 51 F.3d 400, 402 (4th Cir. 1995). In determining whether a defendant's plea is acceptable, the court should focus on "three main elements":

> The court must first ascertain what the defendant actually knows when he pleads guilty on the basis of an affirmative indication in the record. Second, the court must decide what information would have been added to the defendant's knowledge by compliance with Rule 11. Finally, the court must determine how the additional or corrected information would have likely affected the defendant's decision.

Id. (citing United Stats v. Padilla, 23 F.3d 1220, 1222 (7th Cir. 1994) and United States v. Johnson, 1 F.3d 296, 302 (5th Cir. 1993)).

We have reviewed the transcript of the plea hearing with care (but also with the requisite deference), and find that the judge adequately complied with Fed. R. Crim. P. 11. Likewise, we hold that Husband knew or surely should have known that a sentence under the Guidelines could include an upward departure. Thus, it follows that no information would have been added to the defendant's knowledge, and Husband's "knowledge and comprehension of the full and correct information would not have been likely to affect his willingness to plead guilty." Goins at 402.

Husband relies upon the following exchange from the plea hearing as evidence that his plea violated Rule 11 and was not knowing and voluntary:

> THE COURT: In other words, without a background presentence report, Mr.

> Husband, the only promise that I can make to you today is that your sentence on counts one through eight would be somewhere between a minimum of ten years and a maximum of 20; do you understand?
>
> THE DEFENDANT: Yes, ma'am.

J.A. 47. Husband clings to this single statement with a vise-like grip, and extrapolates from it - particularly, the singular use of the word "sentence" - that the judge "promised" no more than 2 0 years in prison in total.[5]

Appellant's assertion that he did not know he might be sentenced to more than twenty years might have more merit if this was the only instance of the court discussing his potential punishment. But, of course, it is not the only instance. The judge stated, "And the maximum possible penalty on each of these counts, then, Mr. Husband, is a maximum of 20 years imprisonment and a minimum of ten years. Do you understand that penalty?" J.A. 35 (emphasis added). Husband replied affirmatively. The judge also noted that Husband would be subject to supervised release, "not more than three years on each count." J.A. 42 (emphasis added). Finally, the court also informed him prior to his guilty plea that, "in relation to any sentence that the court will impose, the United States sentencing guidelines are in effect," J.A. 35-36, and that, "ultimately under the law, it is up to the court to sentence you under the federal sentencing guidelines[.]" J.A. 46. See also J.A. 48. Husband assented to these statements, stated that he had discussed the

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[5]Husband also puts forth the odd argument that his plea was not knowing and voluntary because he was unaware of his appellate counsel's statute of limitations argument. Since we disposed of the statute of limitations issue in Part I.A., supra, we will expend no more effort on it here. Suffice it to say that a criminal defendant thinking of relying on his ignorance of a meritless affirmative defense to overcome an otherwise knowing guilty plea may wish to consider other arguments.

Guidelines with his attorney, and also acknowledged at least twice more the court's assurance that, under the Guidelines he would be sentenced based on the totality of his criminal conduct: not only on "the crimes to which you are pleading guilty, but all of your relevant criminal conduct in regard to the crimes to which you are pleading guilty[.]" J.A. 36.

Further, in attempting to decipher "what the defendant actually knows when he pleads guilty on the basis of an affirmative indication in the record," Goins, 51 F.3d at 402, one cannot ignore the fact that Husband was represented by a lawyer. Husband admits to discussing the Guidelines with his lawyer (who, of course, should have explained the Guidelines and indicated the possibility of upward departure). Thus, any reasonable reading of the transcript indicates that Husband knew or should have known that the equivalent of consecutive sentences was possible through upward departure.

Finally, however, had Husband been unsure of how his sentence would be calculated - stated otherwise, had he lied to the district court when he acknowledged that he understood that the Guidelines governed and that he had discussed how they worked with his lawyer - we have no reason to believe that he would not have pled guilty.[6] Given the overwhelming nature of the government's proffered evidence (including actual videotaping of the sexual exploitation), Husband had no shortage of good reasons for not going to trial. For example, he apparently got the government to drop counts 18, 19, and 20 by pleading guilty. Additionally, while we only review a cold record,

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[6]Indeed, if his understanding of the sentence was truly unclear (which seems to be the best he could hope for upon a full and fair reading of the record), Husband said nothing and still pled, it seems to lead to the conclusion that his sentence was not really a primary consideration in his decision of whether to plead guilty; that is, other things were driving him.

Husband expresses regret for the humiliation his actions caused his family. It is highly likely that, in a case with facts this uncontested, horrible, and hurtful, he did not want the public shame of a trial. Indeed, perhaps he wished not to force his family to endure yet another wrenching experience. In short, Husband must have (or at the very least should have) known that the court could upwardly depart, and even if he had not known, it remains entirely unclear that this knowledge would have been "likely to affect his willingness to plead guilty." Goins, 51 F.3d at 402.

C.

Appellant also contends that the court failed to find sufficient evidence for his plea. "Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea." Fed. R. Crim. P. 11(b)(3). "The court need not satisfy itself that a jury would find the defendant guilty, or even that defendant is guilty by a preponderance of the evidence." United States v. Carr, 271 F.3d 172, 179 n.6 (4th Cir. 2001). Rather, the district court "need only be subjectively satisfied that there is a sufficient factual basis for a conclusion that the defendant committed all of the elements of the offense. The district court possesses wide discretion in determining whether a sufficient factual basis exists." United States v. Mitchell, 104 F.3d 649, 652 (4th Cir. 1997). The standard of review for such claims is abuse of discretion. Carr, 271 F.3d at 179.

The district court decidedly did not abuse its discretion. The judge read all eight counts, and later asked Husband whether he wished that the judge review the eight counts again before asking for Husband's plea. Husband did not want to review the counts and pled guilty. Before accepting Husband's plea, the government proffered its evidence, the judge asked Husband whether he agreed with the proffer, and Husband and his counsel both agreed. The

government's proffered evidence of guilt was overwhelming. Each element was listed in the indictments and reasonably reviewed to the judge's subjective satisfaction in the guilty plea hearing. Thus, the court established a sufficient basis for the plea.

D.

Husband also appeals his punishment of eight consecutive 87-month sentences followed by eight consecutive three-year terms of supervised release. Husband's contention is that the combined offense level for the eight similar counts was properly grouped in the PSR. As such, since the 1995 Guideline-based range of 70-87 months per count fell below the (incorrect) statutory maximum of ten years, the extent of any consecutive sentence could only rise to the level of the (alleged) maximum.

The government, in response, rightly admits that the court could not have run the sentences consecutively in this case absent a departure, but argues that the consecutive sentences are appropriate because the district court properly upwardly departed from the Guidelines. Because he failed to object to the sentencing below, this issue too is reviewed for plain error. United States v. Jarvis, 7 F.3d 404, 409-10 (4th Cir. 1993).

First, as noted above and explained in footnote 4, supra, the court erred by using the 1995, rather than the 2002, Sentencing Guidelines. But this error was clearly in Husband's favor: his sentence was half of what he could have received under the 2002 Guidelines. More

fundamentally, however, the court did not, as it should have, clearly grant the motion for upward departure.[7]

Even granting that the district court erred by not officially granting the motion for upward departure, this error does not harm Husband because, if we were to remand, the court undoubtedly would grant an upward departure and sentence Husband to precisely the same 696-month sentence that he has now if we remanded the matter to the court. Specifically, the court explains,

> If for some reason the appellate court is not in agreement with me, then my alternative ruling is that I would upwardly depart on these matters. In other words, I would not be in the guideline range here. I would upwardly depart and do an appropriate sentence with an upward departure that would meet the goals of this particular case.

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[7] The record states that, at the sentencing hearing on 7/15/2003, "Court granted gov's motion for upward departure." J.A. 6. The transcript of the hearing, however, complicates things. Essentially, it seems that the court started to rule on the motion, discussed the grounds for upward departure, and indicated its general, strong, and wide-based support for the motion ("I have reviewed those cases, verified their validity, and they support the government's proposition," J.A. 121) and general disapproval of Husband's opposition brief ("The defendant counters that the past conduct is accounted for by the guideline calculations, but I don't agree. . .") . Id. The court then further submits the reasons why the government's position was correct on several different grounds. Things are continually confused, however, by the judge's consistent use of conditional verbs, e.g., "I would find that certainly an upward departure would be warranted. . ."; "Likewise I would find that a departure would be warranted because of the repetitive nature of the conduct."; "So basically I would find that there are all of these grounds to depart upward.". J.A. 123-24 (emphasis added). Ultimately, and particularly when considering the court's Statement of Reasons, it appears clear enough to us that the district court errantly believed that it could sentence Husband to consecutive terms absent an upward departure, and thus that it did not actually grant the government's motion at the sentencing hearing.

J.A. 125-26. As noted above, the statutory maximum for the crime is 10 years per count even if the court uses the PSR's recommendation (which, as the district court ultimately recognized, is a mistake, given that the proper standard is a 20 year maximum, but one we will not here correct because it favors Husband) . Thus, even granting that there was an error, and that it may have been "plain," the error certainly does not affect Husband's substantial rights, for he would justifiably receive precisely the same sentence. See Olano, 507 U.S. at 732-37.

E.

Finally, Husband claims that his counsel was ineffective because he failed to raise the statute of limitations defense. Claims of ineffective assistance may not be raised on direct appeal unless the record demonstrates ineffectiveness conclusively. United States v. Richardson, 195 F.3d 192, 198 (4th Cir. 1999); United States v. King, 119 F.3d 290, 295 (4th Cir. 1997); United States v. Hoyle, 33 F.3d 415, 418 (4th Cir. 1994). Ineffective assistance of counsel claims must meet the two-step test of Strickland v. Washington, 466 U.S. 668, 687 (1984): (1) counsel's performance is objectively deficient, and (2) the deficient performance prejudices the defendant. Because, as explained in Part II.A, supra, the statute of limitations argument is meritless, failure to make it cannot be deficient at all, much less "objectively" so. Likewise, Husband is in no way prejudiced by his counsel's conduct.

III

For all the reasons as stated above, on all issues raised by Appellant, the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Newport News Division

[ENTERED: July 16, 2003]

UNITED STATES OF AMERICA

v.

Case Number
4:02CR00125-001

JIMMY RICHARD HUSBAND,

Defendant.

JUDGMENT IN A CRIMINAL CASE

The defendant, JIMMY RICHARD HUSBAND, was represented by Christopher J. Collins.

The defendant pleaded guilty to count(s) 1, 2, 3, 4, 5, 6, 7, and 8. Accordingly, the defendant is adjudged guilty of the following count(s), involving the indicated offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
T.18:2251(a)(d) 2256(1) and (2)	Knowingly use persuade, induce, entice and coerce a minor child, "Jane Doe," to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct which was transported in interstate commerce (Felony)	Summer or Fall 1995	1
T.18:2251(a)(d), 2256(1) and (2)	Knowingly use, persuade, induce, entice and coerce "Jane Doe" to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct which was transported in interstate commerce (Felony)	Summer or Fall 1995	2 and 3

On motion of the United States, the court has dismissed count(s) 18, 19, and 20 with prejudice.

As pronounced on July 15, 2003, the defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Given this 15th day of July, 2003.

/s/ Rebecca Beach Smith
Rebecca Beach Smith
United States District Judge

Defendant's SSN: 512-54-5196 USM#: 09491-031
Defendant's Date of Birth: 5/3/52
Defendant's Mailing Address: Western Tidewater Regional Jail, 2402 Godwin Boulevard, Suffolk, Virginia 23434
Defendant's Residence Address: 1601 Willow Lane, Garden City, Kansas 67846

Continuation of Counts from Page 1

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
T.18:2251(a)(d), 2256(1) and (2)	Knowingly use, persuade, induce, entice and coerce "Jane Doe" to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct which was transported in interstate commerce (Felony)	Fall 1995	4
T.18:2251(a)(d), 2256(1) and (2)	Knowingly use, persuade, induce, entice and coerce "Jane Doe" to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct which was transported in interstate commerce (Felony)	February 19, 1996	5

T.18:2251(a)(d), 2256(1) and (2)	Knowingly use, persuade, induce, entice and coerce "Jane Doe" to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct which was transported in interstate commerce (Felony)	Spring 1996	6, 7

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of SIX HUNDRED NINETY-SIX (696) MONTHS. The term consists of EIGHTY-SEVEN (87) MONTHS on counts one, two, three, four, five, six, seven and eight, all to be served consecutively.

The court makes the following recommendations to the Bureau of Prisons:

The court directs that while incarcerated, the defendant shall participate in a substance abuse program.

The court directs that while incarcerated, the defendant shall receive mental health counseling for his pedophiliac tendencies and sexually aberrant behavior, and any other mental health treatment appropriate for his sex offender status.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

____

Defendant delivered on _____to _____ at _____, with a certified copy of this Judgment.

Mailed:
c: P.O. (2) (3)
Mshl. (4) (2)
U.S.Atty.
U.S.Coll.
Dft. Cnsl.
PTS
Financial
Registrar
ob

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of TWENTY-FOUR (24) YEARS. The term consists of THREE (3) YEARS on counts one, two, three, four, five, six, seven, and eight, all to run consecutively.

The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of supervised release.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime.

While on supervised release, the defendant shall not illegally possess a controlled substance.

While on supervised release, the defendant shall not possess a firearm or destructive device.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

STANDARD CONDITIONS OF SUPERVISED RELEASE

The defendant shall comply with the standard conditions that have been adopted by this court (set forth, below):

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant-shall notify the Probation Officer within 72 hours, or earlier if so directed, of any change in residence..

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

While on supervised release, pursuant to this Judgment, the defendant shall also comply with the following additional conditions:

1) The defendant shall not incur new credit card charges or open additional lines of credit without the approval of the probation officer.

2) The defendant shall provide the probation officer with access to requested financial information.

3) The defendant shall continue to participate in a substance abuse program, at the direction and discretion of the probation officer.

4) The defendant shall comply with all applicable federal, state, and local laws regarding sex offender registration.

5) The defendant shall be prohibited from having any contact with the victim or the victim's mother.

6) The defendant shall not possess or use a computer to access any online computer services at any location, including employment, without the prior approval of the probation officer and the court. This includes any internet service providers, bulletin board systems, or any other public or private computer network.

7) The defendant shall not have any access to or possess any pornographic material or pictures displaying nudity or any magazines using young juvenile models or pictures of juveniles under the age of 18.

8) The defendant shall not be in the presence of children under the age of 18 years without another responsible adult being present in the same room or area.

9) The defendant shall be required to continue to participate in a sex offender's treatment program throughout the term of supervision.

10) The defendant shall submit to polygraph testing as directed by the United States Probation Officer as part of his sex offender therapeutic program. The

costs of the testing are to be paid by the defendant as directed by the probation officer.

11) The defendant shall submit to Penile Plethysmograph or Abel Testing as directed by the United States Probation Office as part of his sexual offender therapeutic treatment. The costs of the testing are to be paid by the defendant as directed by the probation officer.

12) The court does not deny federal benefits because it is not applicable.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total monetary penalties in accordance with the schedule of payments set out below.

Count	Special Assessment	Fine
1	$50.00	
2	$50.00	
3	$50.00	
4	$50.00	
5	$50.00	
6	$50.00	
7	$50.00	
8	$50.00	
Total	$400.00	

FINE

No fines have been imposed in this case.

COSTS

The court waives the cost of prosecution, incarceration, and supervised release except for the costs of the testing encompassed with his mental health treatment.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

The special assessment is due in full immediately. If not paid immediately, the court authorizes the deduction of appropriate sums from the defendant's account while in confinement in accordance with the applicable rules and regulations of the Bureau of Prisons.

Any special assessment, restitution, or fine payments may be subject to penalties for default and delinquency.

If this judgment imposes a period of imprisonment, payment of Criminal Monetary penalties shall be due during the period of imprisonment.

All criminal monetary penalty payments are to be made to the Clerk, United States District Court, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

STATEMENT OF REASONS
(Not for Public Disclosure)

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except:

Sentences on each count run consecutively as opposed to concurrently.

Guideline Range Determined by the Court:

Total Offense Level: 27
Criminal History Category: 1
Imprisonment Range: 70 to 87 months (per count)
Supervised Release Range: 2 to 3 years
Fine Range: $ 12.500 to $ 125.000

[X] Fine waived or below the guideline range because of inability to pay. Restitution: $ 868

[ ] Full restitution is not ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range, does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

[X] The sentence is within the guideiine range, that range exceeds 24 months, and the sentence is imposed for the following reason(s);

The sentence on each count is within the guideline range. However, the court finds it necessary to run the sentences on the counts consecutively to meet the total punishment required to best serve the

sentencing objectives of punishment, deterrence, and rehabilitation.

OR

[ ] The sentence departs from the guideline range.

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

RESTITUTION AND FORFEITURE

RESTITUTION

The court, pursuant to the Victim and Witness Restitution Act, finds that the following is/are victim(s) of defendant's criminal conduct and has/have sustained loss in the indicated amounts and orders $868.00 restitution by the defendant as follows:

Name & address of payee(s)	Amount
The victim's name and address are identified in Document number 23, filed under SEAL with The court on July 15, 2003.	$868.00
Total	$868.00

Payments of restitution are to be made to Clerk, U. S. District Court.

Restitution is due and payable immediately.

Interest on the restitution has been waived.

If there are multiple payees, any payment not made directly to a payee shall be divided proportionately among the payees named unless otherwise specified here:

FORFEITURE

The court entered a Consent Order of Forfeiture on July 15, 2003.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[ENTERED: March 14, 2005]

FILED
March 14, 2005

No. 03-4630
CR-02-125

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

JIMMY RICHARD HUSBAND
Defendant - Appellant

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Wilkinson, Judge Gregory, and Judge Shedd.

For the Court,

/s/ Patricia S. Connor
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

[ENTERED: October 15, 2002]

UNITED STATES OF AMERICA	)	UNDER SEAL
	)	
v.	)	CRIMINAL NO. 4:02cr
	)	
JIMMY RICHARD HUSBAND	)	18 U.S.C. §§ 2251(a)(d) and 2256(1), (2) Sexual Exploitation of a Minor (Counts 1-17)
	)	
	)	18 U.S.C. §§ 2252A(a)(1)) and 2256(1) and (2) Transportation of Child Pornography (Count 18)
	)	
	)	18 U.S.C. §§ 2252A(a)(5) (B) and 2256(1) and (2) Possession of Child Pornography (Counts 19-20)
	)	
	)	18 U.S.C. § 2253 Criminal Forfeiture

INDICTMENT

October 2002 Term - at Norfolk, Virginia

COUNT ONE

THE GRAND JURY CHARGES THAT:

In or about the Summer or Fall 1995, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 20 minutes, did knowingly use, persuade, induce, entice and coerce a minor child (hereinafter, referred to as "Jane Doe"), on a sofa located in the basement of 8250 Gulf Bridge Road, in West Monroe, New York, to engage in sexually explicit conduct, that: is, the lascivious exhibition of the genitals and pubic area, urination, genital-genital and oral-genital sexual intercourse, and masturbation, with the intent that said minor engage in sexually-explicit conduct for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT TWO

THE GRAND JURY FURTHER CHARGES THAT:

In or about the Summer or Fall 1995, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 15 minutes, did knowingly use, persuade, induce, entice and coerce "Jane Doe," sitting on an office chair located in the basement of 8250 Gulf

Bridge Road, in West Monroe, New York, to engage in sexually explicit conduct, that is the lascivious exhibition of the genitals and pubic area, masturbation, and oral-genital sexual intercourse, with the intent that said minor engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT THREE

THE GRAND JURY FURTHER CHARGES THAT:

In or about the Summer or Fall 1995, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 5 minutes, did knowingly use, persuade, induce, entice and coerce "Jane Doe," sitting nude on the side of the bathtub in the children's bathroom located on the second floor of 8250 Gulf Bridge Road, West Monroe, New York, to engage in sexually explicit conduct, that is masturbation and the lascivious exhibition of the genitals and pubic area, with the intent that said minor engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code Sections 2251(a)(d), 2256(1) and (2)).

COUNT FOUR

THE GRAND JURY FURTHER CHARGES THAT:

In or about the Fall 1995, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 10 minutes, did knowingly use, persuade, induce, entice and coerce "Jane Doe," standing nude on the bed in the master bedroom located at 8250 Gulf Bridge Road, in West Monroe, New York, to engage in sexually explicit conduct, that is the lascivious exhibition of the genitals and pubic area and masturbation, with the intent that said minor engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT FIVE

THE GRAND JURY FURTHER CHARGES THAT:

On or about February 19, 1996, JIMMY RICHARD HUSBAND, the defendant, for approximately 5 minutes, did knowingly use, persuade, induce, entice and coerce "Jane Doe," nude and dancing on the bed in the minor child's bedroom located at 8250 Gulf Bridge Road, in West Monroe, New York, to engage in sexually explicit conduct, that is the lascivious exhibition of the genitals and pubic area and masturbation, with the intent that said minor engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New

York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT SIX

THE GRAND JURY FURTHER CHARGES THAT:

In or about the Spring 1996, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 5 minutes, did knowingly use, persuade, induce, entice and coerce "Jane Doe," nude and leaning back against a sofa in the living room located at 8250 Gulf Bridge Road, in West Monroe, New York, to engage in sexually explicit conduct, that is the lascivious exhibition of the genitals and pubic area and masturbation, with the intent that said minor engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT SEVEN

THE GRAND JURY FURTHER CHARGES THAT:

In or about the Spring 1996, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 15 minutes, did knowingly use, persuade, induce, entice and coerce "Jane Doe," on the bed in her bedroom located at 8250 Gulf Bridge Road, in West Monroe, New York, to engage in sexually explicit conduct with the

intent that said minor engage in sexually explicit conduct, that is masturbation and the lascivious exhibition of the genitals and pubic area, for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT EIGHT

THE GRAND JURY FURTHER CHARGES THAT:

In or about the Spring 1996, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 10 minutes, did knowingly use, persuade, induce, entice and coerce "Jane Doe," in the living room located at 8250 Gulf Bridge Road, in West Monroe, New York, to engage in sexually explicit conduct with the intent that said minor engage in sexually explicit conduct, that is the lascivious exhibition of the genitals, oral-genital sexual intercourse and masturbation, for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT NINE

THE GRAND JURY FURTHER CHARGES THAT:

In or about 1996, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 30 minutes, did knowingly use, persuade, induce, entice and coerce "Jane Doe," lying nude on the bed in the master bedroom located at 8250 Gulf Bridge Road, in West Monroe, New York, to engage in sexually explicit conduct, that is oral-genital sexual intercourse, masturbation, and the lascivious exhibition of the genitals and pubic area, with the intent that said minor engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT TEN

THE GRAND JURY FURTHER CHARGES THAT:

In or about 1996, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 30 minutes, did knowingly use, persuade, induce, entice and coerce "Jane Doe," sitting nude on the edge of the bed in the master bedroom located at 8250 Gulf Bridge Road, West Monroe, New York, to engage in sexually explicit conduct, that is the lascivious exhibition of the genitals, urination, masturbation, and oral-genital sexual intercourse, with the intent that said minor engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, which was transported in

interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT ELEVEN

THE GRAND JURY FURTHER CHARGES THAT:

In or about 1996, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 30 minutes did knowingly use, persuade, induce, entice and coerce "Jane Doe," in the master bedroom located at 8250 Gulf Bridge Road, in West Monroe, New York, to remove her white bra and panties, and then engage in sexually explicit conduct, that is urination, the lascivious exhibition of the genitals and pubic area, oral-genital sexual intercourse, and masturbation, with the intent that said minor engage in the sexually explicit conduct for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections2251(a)(d), 2256(1) and (2)).

COUNT TWELVE

THE GRAND JURY FURTHER CHARGES THAT:

In or about 1996, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 15 minutes, did knowingly use, persuade, induce, entice and coerce "Jane Doe," wearing an olive T-

shirt in the master bedroom located at 8250 Gulf Bridge Road, West Monroe, New York, to engage in sexually explicit conduct with the intent that said minor engage in sexually explicit conduct, that is urination, masturbation, and the lascivious exhibition of the genitals, for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT THIRTEEN

THE GRAND JURY FURTHER CHARGES THAT:

In or about 1996, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 15 minutes did knowingly use, persuade, induce, entice and coerce "Jane Doe," lying nude in the master bedroom located at 8250 Gulf Bridge Road, in West Monroe, New York, to engage in sexually explicit conduct with the intent that said minor engage in sexually explicit conduct, that is urination, masturbation and the lascivious exhibition of the genitals and pubic area, for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In. violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT FOURTEEN

THE GRAND JURY FURTHER CHARGES THAT:

In or about 1996, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 15 minutes, did knowingly use, persuade, induce, entice and coerce "Jane Doe" lying nude and wearing white socks while in the master bedroom located at 8250 Gulf Bridge Road, in West Monroe, New York, to engage in sexually explicit conduct, that is the lascivious exhibition of the genitals and pubic area and masturbation, with the intent that said minor engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections 2251(a)(d), 22S6(1) and (2)).

COUNT FIFTEEN

THE GRAND JURY FURTHER CHARGES THAT:

In or about 1996, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 40 minutes, did knowingly use, persuade, induce, entice and coerce "Jane Doe" who was wearing red panties, a white bra and socks while in the master bedroom located at 8250 Gulf Bridge Road, in West Monroe, New York, to engage in sexually explicit conduct, that is the masturbation, the lascivious exhibition of the genitals and pubic area and oral to genital sexual intercourse, with the intent that said minor engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce

from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT SIXTEEN

THE GRAND JURY FURTHER CHARGES THAT:

In or about 1996, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 30 minutes, did knowingly use, persuade, induce, entice and coerce "Jane Doe"" who was wearing a white T-shirt and bra while in the master bedroom located at 8250 Gulf Bridge Road, in West Monroe, New York, to engage in sexually explicit conduct, that is the lascivious exhibition of the genitals and pubic area, oral-genital sexual intercourse and masturbation with the intent that said minor engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT SEVENTEEN

THE GRAND JURY FURTHER CHARGES THAT:

In or about 1996, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant, for approximately 20 minutes, did knowingly use, persuade, induce, entice and coerce "Jane *Doe*," nude and wearing only socks and a watch band while in the master bedroom

located at 8250 Gulf Bridge Road, in West Monroe, New York, to engage in sexually explicit conduct, that is urination, the lascivious exhibition of the genitals and pubic area and masturbation with the intent that said minor engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, which was transported in interstate commerce from West Monroe, New York to Newport News, Virginia, within the Eastern District of Virginia.

(In violation of Title 18, United States Code, Sections 2251(a)(d), 2256(1) and (2)).

COUNT EIGHTEEN

THE GRAND JURY FURTHER CHARGES THAT:

In or about October 2001, the exact date being unknown, JIMMY RICHARD HUSBAND, the defendant did knowingly transport in interstate and foreign commerce, from 8250 Gulf Bridge Road, in West Monroe, New York, to 471 Harcourt Place, in Newport News, Virginia, in the Eastern District of Virginia, one (1) VHS video tape depicting child pornography.

(In violation of Title 18, United States Code, Sections 2252A(a) (1) and 2256(1) and (2)).

COUNT NINETEEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about January 11, 2002, at 471 Harcourt Place, in Newport News, Virginia, in the Eastern District of Virginia, JIMMY RICHARD HUSBAND, the defendant herein, did knowingly and unlawfully possess material that is one (1) VHS video tape which contained an image of child

pornography that had been transported in interstate commerce.

(In violation of Title 18, United States Code, Sections 2252A(a)(5)(B), 2256(1) and (2)).

COUNT TWENTY

THE GRAND JURY FURTHER CHARGES THAT:

On or about January 11, 2002, at 471 Harcourt Place, in Newport News, Virginia, in the Eastern District of Virginia, JIMMY RICHARD HUSBAND, the defendant herein, did knowingly and unlawfully possess material, that is one (1) HP mid-power computer, containing a Maxtor model #94610U6 hard drive, made in Singapore, which contained an image of child pornography, that is a jpg image entitled "np32.jpg" and a video entitled "heather.mpg" which was produced using material that had been shipped or transported in interstate and foreign commerce.

(In violation of Title 18, United States Code, Sections 2252A(a)(5)(B), 2256(1) and (2)).

CRIMINAL FORFEITURE

Upon conviction for violating Title 18, United States Code, Sections 2251(a)(d), 2252A(a)(1) or 2252A(a)(5)(B), defendant JIMMY RICHARD HUSBAND shall forfeit to the United States any and all matter which contains visual depictions produced, transported, shipped or received in violation thereof and any and all property used or intended to be used in any manner or part to commit and to promote the commission of the aforementioned violation, seized from 471 Harcourt Place, Newport News, Virginia, on January 11, 2002, including but not limited to the following:

a. one (1) VHS tape described in Counts 18 and 19;

b. miscellaneous sex toys (including two vibrators and one pocket vagina);

c. one (1) "Family Taboo" Magazine;

d. one (1) "Perverted The Babysitters- Volume #1" VHS Tape;

e. one (1) Sony Digital Camera and Solidex Tripod;

f. one (1) Hewlett Packard Pavilion Hard Drive, Serial #US02802347, containing one (1) Maxtor model #94610U6 hard drive;

g. eight (8) ZIP 100 media depicting bestiality;

h. all VHS tapes depicting adult pornography seized by the Newport News Police Department and the Gloucester Sheriff's Department; and

i. any and all pictures of the minor described in Counts One through Nineteen of the Indictment.

(In violation of Title 18, United States Code, Section 2253).

A TRUE BILL:

/s/
FOREPERSON

PAUL J. McNULTY
UNITED STATES ATTORNEY

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Supreme Court, U.S.
FILED
JUN 29 2005
OFFICE OF THE CLERK

No. 04-1698

In the Supreme Court of the United States

JIMMY R. HUSBAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

PAUL D. CLEMENT
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Department of Justice
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No. 04-1698

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MEMORANDUM FOR THE UNITED STATES

Petitioner contends that his sentence under the federal Sentencing Guidelines was imposed in violation of the rule announced in *United States* v. *Booker* and *United States* v. *Fanfan*, 125 S. Ct. 738 (2005). In *Booker* and *Fanfan*, this Court held that the Sixth Amendment, as construed in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), applies to the federal Sentencing Guidelines. *Booker*, 125 S. Ct. at 748-756 (Stevens, J., for the Court). In answering the remedial question in those cases, the Court then applied severability analysis and held that the Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for reasonableness. *Booker*, 125 S. Ct. at 757-769 (Breyer, J., for the Court). Accordingly, the appropriate disposition is to grant certiorari, vacate the judgment of the court of appeals, and remand the case for further

consideration in light of *Booker* and *Fanfan*. The court of appeals can then decide what effect, if any, those decisions have on petitioner's sentence, taking into account any applicable doctrines of waiver, forfeiture, and harmless error.* See *id.* at 769.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JUNE 2005

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* The government waives any further response to the petition unless the Court requests otherwise.